No. 78-1022

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED DAVID CROWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY ELLEN MERKAMP
SAMUEL M. FORSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 586 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1978. The petition for a writ of certiorari was filed on December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized from petitioner's trash after the trash collector had removed it from petitioner's property should have been suppressed at trial.

2. Whether the government infringed petitioner's privacy interests under the Fourth Amendment when it searched premises neither owned nor leased by petitioner.

3. Whether petitioner had a right to individual voir dire of the jury concerning trial publicity.

4. Whether petitioner was entitled to a hearing to determine whether, contrary to the government's assertions, "beepers" attached to petitioner's airplane and to a car belonging to another for the purpose of monitoring their movements actually functioned as intended and produced evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiracy to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense phencyclidine (PCP), a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846, and on four counts of traveling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3) (Pet. App. 2a).[1] He was sentenced to terms of incarceration totaling 15 years, a five-year special parole term, and a fine of $10,000. The court of appeals affirmed (Pet. App. 1a-17a).

The evidence at trial consisted primarily of the observations of agents who had conducted surveillance, the fruits of several searches, and testimony of people involved in the conspiracy. It proved a scheme to manufacture PCP, initially at petitioner's home, where he and a co-defendant refined a process they derived largely

[1]Two co-defendants were also convicted by the jury, other co-defendants pleaded guilty, and one co-defendant's motion for judgment of acquittal was granted at the close of the government's case.

from United States Patent Office records (Tr. 13-14, 23-24). As the enterprise grew in number of persons involved and in volume of PCP produced, remote secret laboratories were established and chemicals were brought in from various States (Tr. 104-105, 109-110).

1. PCP seized from a search of trash obtained from petitioner's residence in Montgomery County, Maryland, was admitted into evidence at trial. On April 3, 1975, an employee of a private trash disposal company went on petitioner's premises to collect the trash (P.H. Tr. 22).[2] Upon leaving the premises, the collector was approached by two police officers who were standing on the street (P.H. Tr. 22, 25). On request, the collector turned the bag over to them (*ibid.*). A few days later, the collector was once again approached in the street by an officer and again turned over a bag of petitioner's trash (P.H. Tr. 26).

2. Premises in Virginia, West Virginia, and Maryland, were searched pursuant to several warrants; these searches resulted in the seizure of chemicals and apparatus used by the conspirators in manufacturing PCP (Pet. App. 9a). Petitioner did not own or lease any of the premises, nor was he present when they were searched (Pet. App. 10a). He nevertheless moved to suppress the seized evidence, arguing that he must have had a possessory interest in the premises used to manufacture PCP and store chemicals. He supported this contention with argument by counsel concerning what the government could be expected to seek to prove at trial. He did not testify or present any other witnesses (J.A. 242-276).[3] Petitioner also claimed that he had a possessory interest in the items seized and that he had "automatic standing to

[2]"P.H. Tr." refers to the transcript of a pretrial hearing conducted on August 9, 1976.

[3]"J.A." refers to the joint appendix filed in the court of appeals.

challenge the searches." The district court ruled that petitioner did not have standing to contest the searches and seizures and characterized petitioner's possessory or proprietary interest in the premises as "speculative at best" (J.A. 276).

3. Before trial, petitioner moved for a continuance, severance, and change of venue because of an article in a Baltimore newspaper (V. Tr. 3-7; J.A. 140-141).[4] The trial judge denied the motions, indicating that voir dire would suffice to determine whether the prospective jurors had been prejudicially infected by the publicity (V. Tr. 12-14). During voir dire, the trial judge questioned the veniremen about publicity, struck for cause one who had read the newspaper piece, and admonished the group not to read or listen to anything concerning the case (V. Tr. 17-29). After the initial voir dire, the trial judge discussed the subject at the bench with counsel, and no one raised any objections to any of the questions regarding publicity (V. Tr. 29-32). When counsel requested the judge to again question the veniremen about exposure to publicity, he promptly did so (V. Tr. 32).

After the petit jury was selected and sworn, the judge admonished its members at length not to read about or discuss the case with anyone (V. Tr. 43-46). At the lunch break, at the close of the first day of trial, and on a number of occasions during the trial the judge instructed the jurors to consider only the evidence at trial and to report immediately any exposure to other information concerning the case (see, *e.g.*, V. Tr. 47; Tr. 90, 285-286, 503-504, 673, 745-746). During trial, petitioner's counsel twice brought to the district judge's attention the appearance of articles in Baltimore newspapers, and the second time he requested a mistrial. On each occasion, the judge inquired

[4] "V. Tr." refers to the transcript of the voir dire of the jury panel.

of the jury collectively concerning whether they had been exposed to publicity, and no jury member responded (Tr. 97-98, 513; J.A. 7-12). After receiving no juror response to his inquiry on the second occasion, the district judge denied the motion for a mistrial (J.A. 12).

4. During the investigation of this case, a beeper was installed on petitioner's airplane pursuant to affidavit and court order, and another beeper was installed without a court order on a car belonging to a co-defendant's wife (Pet. App. 12a). After petitioner's counsel was furnished the affidavit and court order during pretrial discovery, he moved for a hearing and for suppression of the results of all surveillance utilizing the beepers. During a motions hearing, an Assistant United States Attorney represented to the court that "no evidence [was] derived from the utilization of [the] bumper beepers" because contact was lost with both the plane and the car after the beepers were installed (J.A. 37). Thus no surveillance was conducted and no evidence was gathered. The prosecutor also stated that there was no electronic surveillance other than the bumper beepers (J.A. 35-38). Based on these representations, the court denied the request for a hearing. It did, however, allow petitioner's counsel to question the case agent in the prosecutor's presence about the beeper (J.A. 41), but counsel never availed himself of this opportunity.

5. In affirming petitioner's conviction, the court of appeals specifically addressed all of his contentions respecting the searches (Pet. App. 6a-12a) and his contentions respecting prejudicial publicity (Pet. App. 5a-6a) and the installation of bumper beepers (Pet. App. 12a-13a). In deciding the search issues, the court of appeals, *inter alia*, agreed with the district court that petitioner lacked standing to contest searches of a farmhouse in Spotsylvania County, Virginia, and of a shed on a farm in Essex County, Virginia, near Tappahannock (Pet. App. 9a). It held that standing could not be predicated on

ownership of the articles seized unless possession of those articles was an element of the crime charged, and it noted that possession was not an element of the crimes charged here (Pet. App. 9a-10a). The court acknowledged that petitioner's "assertion of a possessory interest in the premises searched, if sustained by the proof, would confer standing on him" (Pet. App. 10a), but it concluded that petitioner had not made the necessary showing in support of his motion to suppress (Pet. App. 10a-12a).

ARGUMENT

1. Petitioner's claim that the district court should have suppressed evidence seized during the search of his trash is without merit. Petitioner had placed his trash outside his house for collection by a private trash disposal company. After it had been collected and removed from petitioner's property, the police obtained possession of it from the collector. Although the collector did not have petitioner's permission to give the trash to the police, no evidence was presented that he was instructed to dispose of the trash in any particular manner. Petitioner thus had no legitimate expectation of privacy in his trash. See *Rakas* v. *Illinois*, No. 77-5781, decided December 5, 1978; *Katz* v. *United States*, 389 U.S. 347, 353 (1967). That a person has a "legitimate" expectation of privacy entails more than a subjective expectation that his trash will not be disturbed. See *Rakas* v. *Illinois*, *supra*, slip op. 15 n.12. Both courts below (Pet. App. 8a) properly found that at the time the private collector had removed the trash from petitioner's premises petitioner had abandoned the items in his trash can and no longer had an interest in them.[5] See *Abel* v. *United States*, 362 U.S. 217, 241 (1960);

[5]A district court's finding of abandonment is based on factual findings regarding action and intent and should not be overturned unless clearly erroneous. *United States* v. *Alden*, 576 F. 2d 772, 777 (8th Cir. 1978); *Magda* v. *Benson*, 536 F. 2d 111, 112 (6th Cir. 1976).

United States v. *Alden*, 576 F. 2d 772, 777 (8th Cir. 1978); *United States* v. *Shelby*, 573 F. 2d 971, 973-974 (7th Cir. 1978); *Magda* v. *Benson*, 536 F. 2d 111 (6th Cir. 1976); *United States* v. *Mustone*, 469 F. 2d 970, 972-973 (1st Cir. 1972); *United States* v. *Dzialak*, 441 F. 2d 212, 215 (2d Cir.), cert. denied, 404 U.S. 883 (1971); *United States* v. *Minker*, 312 F. 2d 632, 634-635 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963). See also *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Basile*, 569 F. 2d 1053, 1056 (9th Cir.), cert. denied, 436 U.S. 920 (1978).[6]

2. Regarding the other searches, petitioner challenges in this Court only the searches of premises in Spotsylvania County, Virginia, and Essex County, Virginia (Pet. 10-19). He bases his contention that he had standing to challenge these searches on (1) his assertion of an interest in items seized (chemicals and apparatus used in the manufacture of PCP) (Pet. 10-16), (2) "automatic" standing, which he alleges was conferred by the nature of the federal charges and by pending state charges of illegal possession (Pet. 17-19), and (3) a possessory interest in the premises searched (Pet. 19). The court of appeals correctly held that these claims either were inadequate on their face to establish standing or were not supported by sufficient proof for that purpose. In the terms employed by this Court in *Rakas* v. *Illinois*, *supra*, slip op. 5, petitioner failed to show an infringement of his personal Fourth Amendment rights.

[6]The only federal case petitioner cites on his behalf is *United States* v. *Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), aff'd in part and rev'd in part, 479 F. 2d 290 (2d Cir. 1973), rev'd, 415 U.S. 239 (1974), in which abandonment was considered only at the district court level. In any event, that case is inapposite because it involved a search of a wastepaper basket within a private office, performed before the contents of the basket had been removed from the office.

a. The Fourth Amendment confers the right to be protected against both unreasonable searches and unreasonable seizures. The proper test for determining whether a defendant's rights have been infringed by an unreasonable search is whether he had "a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois, supra,* slip op. 15, citing *Katz* v. *United States,* 389 U.S. 347 (1967). A defendant without such an expectation of privacy in the place searched suffers no infringement of his Fourth Amendment rights from the "invasion" inherent in that search and therefore cannot challenge the validity of the search, even though it results in the disclosure or seizure of evidence that may be used against him at a criminal trial.

If property belonging to a defendant is seized from an area in which he has no legitimate personal expectation of privacy, a distinction must be drawn between his "standing" to challenge the search and his right to challenge the lawfulness of the seizure of his property. He may be heard only with respect to claims based upon alleged illegality of the seizure itself, not with respect to claims attacking the means by which his property came into the plain view of the searching officers. See *United States* v. *Lisk*, 522 F. 2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).[7]

Petitioner has not claimed that the seizure of items—mainly PCP and instruments and compounds used in its manufacture—from the Spotsylvania farmhouse or the Essex County shed were vulnerable to challenge for any reason apart from his challenge to the right of officers to

[7]This is not a meaningless right. As in the case of any articles seized under the plain view doctrine, such seizures must be based on probable cause. Moreover, seizure of articles contained in a locked suitcase or similar container could be challenged by their owner if the container were opened without a separate warrant. See *United States* v. *Chadwick,* 433 U.S. 1 (1977).

search the premises; and since, as we show below, he failed to prove that he had a legitimate expectation of privacy in the premises, he clearly has shown no infringement of his own Fourth Amendment rights.

b. Petitioner's claim of "automatic standing" fails to support his challenge to the search for the same reason that his claim of possession of the items seized fails, even if we assume that the automatic standing rule of *Jones* v. *United States*, 362 U.S. 257 (1960), survives this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968) (see *Rakas* v. *Illinois*, *supra*, slip op. 7 n.4).[8] Moreover, petitioner lacks automatic standing under *Jones* because he was not charged with a possessory offense. *Brown* v. *United States*, 411 U.S. 223, 229 (1973).[9] Petitioner was charged first with conspiracy which, as the court of appeals noted (Pet. App. 10a), "is not a possessory crime, even where the conspiracy is one to manufacture and posses a controlled substance." See *United States* v. *Riquelmy*, 572 F. 2d 947, 951 (2d Cir. 1978); *United States* v. *Prueitt*, 540 F. 2d 995, 1004 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977), *United States* v. *Hutchinson*, 488 F. 2d 484, 492 (8th Cir. 1973), cert. denied, 417 U.S. 915 (1974). He was also charged with traveling in interstate commerce in aid of a racketeering enterprise, but, again, that kind of offense does not require possession. See *United States* v. *Prince,* 529 F. 2d 1108, 1111-1112 (6th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir), cert.

[8]We disagree with the view expressed by the court of appeals (Pet. App. 9a-10a) that standing to challenge the *search* could be predicated on ownership of the items if a possessory offense were charged.

[9]The mere fact that petitioner may have "automatic standing" in a state court to contest the search in Virginia, where he is charged with a possessory offense, does not confer standing on him in federal court. See *Elkins* v. *United States*, 364 U.S. 206, 224 (1960).

denied, 423 U.S. 874 (1975); *United States* v. *Gibson Specialty Co.*, 507 F. 2d 446 (9th Cir. 1974); *United States* v. *Rizzo*, 418 F. 2d 71, 74 (7th Cir. 1969), cert. denied, 397 U.S. 967 (1970).

c. Petitioner's contention that he had standing to contest the searches of the premises in question by reason of a possessory or proprietary interest in those premises was properly rejected by the district court for failure of proof. As noted, to prove the requisite interest in the premises, petitioner was obligated to show a "legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois, supra,* slip op. 15, citing *Katz* v. *United States, supra,* 389 U.S. at 353. He showed no such interest either in the Spotsylvania County farmhouse or the Essex County shed.

Petitioner introduced no evidence to establish his interest in the searched premises, but instead relied on argument by counsel to the effect that the government would seek to prove at trial that petitioner was the "kingpin" of the PCP manufacturing operation, that he was responsible for setting up manufacturing operations in the Essex County farmhouse and the Spotsylvania County shed, that he had access to and control over both buildings, and that the shed had been rented by his agent. With one exception, petitioner did not even support these assertions with references to specific documents or testimony; and, as noted, he did not testify at the suppression hearing, nor did he present any other witnesses (J.A. 242-276).

Regarding the Essex County shed, petitioner's counsel, who also represented co-defendant Byron Earl Fountaine, argued at the hearing that "investigative reports" provided to him by the government during discovery indicated that the government believed that "this was at least Fountaine's shed, * * * at least Fountaine's operation" (J.A. 252) and that government "allegations" indicated that the shed was Fountaine's, along with "the keys * * * to the lock on the door and the goods * * * inside" (J.A. 267). He also asserted, without specific reference to evidence, that both petitioner and Fountaine had a "possessory or proprietary interest in the shed" and "free access in and out of the shed" (J.A. 252-253). The Assistant United States Attorney denied that the government believed petitioner had any "proprietary or possessory right in the premises" of the house in Spotsylvania County, which he noted "was rented by two women" and owned by a person other than petitioner (J.A. 261). The Essex County shed, he stated, was owned by "another person" and rented by "another person"—not petitioner or Fountaine (J.A. 263).

The district court properly concluded that petitioner had not carried his burden of proving possessory interests in the premises merely by "visiting" them and "alleging some control," since his claims regarding his interest in the premises were "speculative at best" (J.A. 275, 276).

The correctness of the court's ruling was borne out by the evidence at trial. Sandra Swoboda, a tenant in the Spotsylvania farmhouse, testified that petitioner and another person, Andrew Narel, had brought seven boxes into the house sometime in March 1975, that Narel had asked permission to store them in her attic, and that she had reluctantly agreed (Tr. 330-334). Petitioner used contents of the boxes to manufacture PCP in her kitchen, she stated (Tr. 334-335). She further testified, however (Tr. 353), that she told petitioner and Narel "three days and they had to be out" (Tr. 353), and that the two men actually moved the boxes out sometime in the middle of March (Tr. 336-337).

It was stipulated that a Deputy Sheriff for Spotsylvania County would testify that he executed the search warrant for that house on April 5, 1975, and seized from "the

residence" only a single glass bottle and eight newspaper sections containing "white crystals" and two tablespoons containing "white crystalline materials" (Tr. 546-547). It was further stipulated that a chemist would testify that the contents of these items were either PCP or an intermediate product appearing during its manufacture (Tr. 546).

It is thus apparent that even if petitioner had at one time enjoyed a legitimate expectation of privacy in the attic storage area, that expectation ended after he removed the seven boxes. There was nothing to indicate he had any reason to expect that materials he may inadvertently have left behind somewhere in the residence would be undisturbed.

As to the Essex County shed, it was stipulated that the owner would testify that "Butch Walton, Byron Earl Fountaine, and other unidentified individuals" came onto his premises and placed boxes and paint cans "into a shed on his property" and that he had "observed Byron Earl Fountaine on his property on various occasions" (Tr. 688-689). It is conceivable that this would support a Fourth Amendment challenge to the search by Fountaine;[10] but it is clear that it indicates no cognizable interest on the part of petitioner.

Certainly one cannot, as petitioner suggests (Pet. 19), claim a personal Fourth Amendment right on the basis of rights enjoyed by one's co-conspirators on the theory that they are one's agents. *United States* v. *Hunt*, 505 F. 2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975).[11] See also *Alderman* v. *United States*, 394 U.S. 165, 171 (1968).

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[10]Fountaine pled guilty to one count of the indictment.

[11]Petitioner agrees that the Fifth Circuit decision in *United States* v. *Hunt* is "viable" (Pet. 19), but he claims that it is "contrary to the facts of the instant record" (*ibid.*). Petitioner articulates no distinction, and we think that, at least on the question of agency, *Hunt* is squarely in point.

3. Petitioner asserts that he was entitled during his trial to individual voir dire of the jurors to determine whether newspaper publicity had prejudiced them. This contention is baseless. During the jury selection process, one venireman was excused for cause because he had read about the case. After the trial commenced, the district judge advised the jury on many occasions to avoid exposure to media reports about the case, and, if they should read or hear something relevant, to inform the court promptly. Following publication of two newspaper stories relating to the case, the trial judge each time inquired of the jurors whether they had been exposed to publicity regarding the trial; on each occasion, no juror responded. Since no juror had been exposed to trial publicity, further inquiry was unnecessary. See *United States* v. *Jones*, 542 F. 2d 186, 194-197 (4th Cir. 1976); *United States* v. *Hankish*, 502 F. 2d 71, 77 (4th Cir. 1974); *Margoles* v. *United States*, 407 F. 2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969). The court of appeals correctly concluded (Pet. App. 5a-6a) that the trial judge did all that was necessary to ensure a fair trial.

4. Petitioner contends that he should have been afforded a hearing on his claim that some of the government's evidence might have been obtained through the bumper beepers installed on a car and on his airplane. But as an Assistant United States Attorney explained to the district court, neither beeper functioned and thus no evidence was obtained from them. Nonetheless, the trial judge advised defense counsel that he could question the case agent in the prosecutor's presence concerning the beepers; defense counsel never took advantage of this opportunity. Petitioner does not point to any evidence that might have been obtained from the beepers. Furthermore, petitioner had no possessory or

privacy interest in the car, which belonged to his co-defendant's wife, and therefore he could not have challenged the admissibility of any evidence that might have been obtained through surveillance of that vehicle. *Rakas* v. *Illinois*, *supra*. The beeper on his airplane was installed pursuant to court order, and since he makes no claim in this petition that the order was defective or that probable cause was lacking, he has not laid the necessary groundwork for claiming a Fourth Amendment violation.[12] In short, he has shown nothing that would entitle him to a hearing.

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[12]The Ninth Circuit has held that the attachment of a beeper to the exterior of a vehicle does not invade privacy interests protected by the Fourth Amendment unless the attachment involves an intrusion (*e.g.*, entry onto private property) that would otherwise require a warrant, since a beeper lawfully attached to monitor a vehicle's location on the public highways or in the public airspace is simply an aid to visual observations and scarcely more intrusive than other visual surveillance aids, such as radar. *United States* v. *Pretzinger*, 542 F. 2d 517, 520 (9th Cir. 1976); *United States* v. *Hufford*, 539 F. 2d 32, 34 (9th cir.), cert. denied, 429 U.S. 1002 (1976). But see *United States* v. *Holmes*, 521 F. 2d 859, 864-866 (5th Cir. 1975), aff'd en banc by evenly divided court, 537 F. 2d 227 (5th Cir. 1976); United States v. *Frazier*, 538 F. 2d 1322, 1324 (8th Cir. 1976) (dictum), cert. denied, 429 U.S. 1046 (1977). The First Circuit, in United States v. *Moore*, 562 F. 2d 106, 112-113 (1977), has held that, in light of "the lessened expectancy of privacy associated with motor vehicles," law enforcement officers may install a beeper to monitor an automobile's movements without obtaining a warrant, although the court stated that probable cause would be required, While we agree with the Ninth Circuit's view of the matter, this case affords no occasion to resolve any disparity in views among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY ELLEN MERKAMP
SAMUEL M. FORSTEIN
Attorneys

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